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Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02–320–02 OF 2014, W-02–336–02 OF 2014 AND W-02–550–03 OF 2014
ABANG ISKANDAR, IDRUS HARUN AND BADARIAH SAHAMID JJCA
12 APRIL 2016

C

Companies and Corporations — Directors — Breach of fiduciary duties — Two directors colluded to siphon off company's monies — Whether one of directors also employed as company's chief of finance could seek to be absolved by claiming he was merely carrying out instructions of his immediate superior, other rogue director D *— Whether apart from owing fiduciary duties to company as director, employee also owed duty of fidelity to act in best interests of company and not to its detriment*

Redmax Sdn Bhd ('the plaintiff') sued two of its former directors — Zaharen bin Hj Zakaria ('the first defendant') and Abdul Rahman bin Mohd Tahir ('the E second defendant') — in the High Court for various reliefs over their collusive conduct in unlawfully paying out monies belonging to the plaintiff to third parties based on fictitious transactions and documents and thereby committing fraud and breaching their fiduciary duties to the plaintiff and causing it loss and damage. At all material times, the first defendant was a director cum managing F director of the plaintiff whilst the second defendant was its director cum finance director. The financial irregularities were discovered when an audit was carried out. When the first defendant failed to reply to various allegations of misconduct against him, he was dismissed as managing director and removed as director. The second defendant resigned from the plaintiff after he was G questioned about the irregularities. In his defence, the first defendant, inter alia, contended that he was authorised by the plaintiff and its chairman to make the payments to the third parties. The second defendant, on the other hand, contended that any payment he had approved was made in his capacity as employee (head of finance) as instructed by the first defendant. The High H Court allowed the plaintiff's claim against the first defendant for fraud, breach of fiduciary duties and breach of fidelity and ordered him to pay the plaintiff RM15,371,000 in general damages, RM500,000 in exemplary damages and RM100,000 in costs. The claim against the second defendant was dismissed on the ground he had merely followed the instructions given to him by his I superior ('the first defendant') at the risk of facing adverse consequences if he had not obeyed them. Two of the instant appeals by the first defendant were against the High Court's separate findings on liability and quantum whilst the plaintiff's appeal was against the dismissal of its claim against the second defendant.

Held, dismissing the first defendant's appeals and affirming the decision of the High Court in that respect; allowing the plaintiff's appeal, setting aside the High Court's judgment vis-a-vis the second defendant, entering judgment against him and ordering him to pay the plaintiff RM200,000 in exemplary damages:

(1) The High Court erred in accepting the defence of the second defendant and exonerating him from liability for the losses suffered by the plaintiff. The available evidence could not sustain such a finding in the light of the prevailing legal position at all material times (see para 55).

(2) The second defendant owed the company a fiduciary duty as director and a duty of fidelity as an employee. He had not only been aware of the improper dealings that surrounded the preparation of the necessary documents needed to make the payments to the unauthorised third parties, he was, in fact, personally involved in the creation of numerous fictitious documents. When the monies were returned to the first defendant after the unauthorised third parties had deducted 4% from the sum paid to them, the second defendant turned a blind eye and did not inform the plaintiff of that fact. The court was unanimous in the view the second defendant was liable for fraud, breach of fiduciary duties and breach of duty of fidelity (see paras 38 & 50–51).

(3) The second defendant had done acts which led to the plaintiff suffering huge losses. He did not deny doing what he did. His only defence, that he was acting under the instructions of his immediate superior, ie the first defendant, could not apply in his favour as he was in a fiduciary position and his legal duty was to protect the interests of the company for as long as he remained a director. The monies that found their way to the unauthorised third parties could not have been possible without the knowing and deliberate facilitation of the second defendant in view of his critical position in the company. As a fiduciary as well as an employee, the second defendant failed to discharge the respective duties that were expected of him (see paras 48–49).

(4) Although ordinarily, being a subordinate necessarily meant the second defendant had to obey the first defendant's instructions, the law did not impose an absolute duty to obey in all situations. Only lawful and reasonable directives or instructions had to be obeyed by the subordinate. Definitely instructions which were dubious and plainly unlawful ought not to be obeyed to the tee, if at all. To do so would in fact make the subordinate an accomplice. Given his duty of fidelity to act in a manner that was in the best interests of the company and not to its detriment, blind loyalty and subservience to a superior's instructions could not be condoned and such a defence could not be sustained in the circumstances of the case (see paras 38 & 45).

(5) The evidence against the first defendant was overwhelming. The payments to the third parties were not justified at all. Substantial sums of monies that were returned by the said third parties were in fact paid to the first defendant and thereafter nobody knew what had happened to those monies. From the evidence, in particular from the KPMG forensic audit, out of a total sum of RM18,481,000, only RM3,110,000 was accounted for as having been used to pay the plaintiff's legitimate expenses. The balance of RM15,371,000 remained unaccounted for. On the evidence, there was no cogent reason to disturb the trial court's decision against the first defendant (see paras 63 & 68).

(6) The defendants were ordered to be jointly and severally liable for the damages ordered in this judgment as there was evidence of collusion between them to cause the losses to the plaintiff. The principle was that it did not matter if the role by one of the tortfeasors was minimal, as its existence was sufficient in law to found joint and several liability against the tortfeasors (see para 69).

[Bahasa Malaysia summary

Redmax Sdn Bhd ('plaintif') telah menyaman dua orang bekas pengarahnya — Zaharen bin Hj Zakaria ('defendan pertama') dan Abdul Rahman bin Mohd Tahir ('defendan kedua') — di Mahkamah Tinggi untuk pelbagai relief terhadap tingkah laku pakatan sulit mereka yang menyalahi undang-undang membayar wang kepunyaan plaintif kepada pihak ketiga berdasarkan transaksi dan dokumen palsu dan dengan itu melakukan penipuan dan melanggar tugas fidusiari mereka kepada plaintif dan menyebabkan ia mengalami kerugian dan kerosakan. Pada setiap masa matan, defendan pertama adalah pengarah merangkap pengarah urusan plaintif manakala defendan kedua adalah pengarah merangkap pengarah kewangan itu. Penyelewengan kewangan telah diketahui apabila audit telah dijalankan. Apabila defendan pertama gagal untuk menjawab pelbagai dakwaan salah laku terhadapnya, dia dipecat sebagai pengarah urusan dan disingkir sebagai pengarah. Defendan kedua meletak jawatan daripada plaintif setelah dia disoal tentang penyelewengan itu. Dalam pembelaannya, defendan pertama, antara lain, menegaskan bahawa dia telah diberi kuasa oleh plaintif dan pengerusinya untuk membuat bayaran kepada pihak-pihak ketiga. Defendan kedua, sebaliknya, menegaskan bahawa apa-apa bayaran yang telah diluluskan olehnya telah dibuat atas kapasitinya sebagai pekerja (ketua kewangan) seperti yang diarahkan oleh defendan pertama. Mahkamah Tinggi membenarkan tuntutan plaintif terhadap defendan pertama untuk penipuan, pelanggaran kewajipan fidusiari dan pelanggaran kesetiaan dan memerintahkan agar dia membayar kepada plaintif RM15,371,000 untuk ganti rugi am, RM500,000 untuk ganti rugi teladan dan RM100,000 untuk kos. Tuntutan terhadap defendan kedua telah ditolak atas alasan dia hanya mengikut arahan yang diberikan kepadanya oleh ketuanya (defendan pertama) dengan risiko berhadapan dengan akibat

bertentanagan jika dia tidak mematuhi mereka. Dua rayuan itu oleh defendan pertama adalah terhadap penemuan berasingan Mahkamah Tinggi berhubung liabiliti dan kuantum manakala rayuan plaintif adalah terhadap penolakan tuntutannya terhadap defendan kedua.

Diputuskan, menolak rayuan defendan pertama dan mengesahkan keputusan Mahkamah Tinggi berkenaan tersebut; membenarkan rayuan plaintif, mengetepikan penghakiman Mahkamah Tinggi *vis-a-vis* defendan kedua, memasuki penghakiman terhadapnya dan memerintahkannya membayar plaintif RM200,000 untuk ganti rugi teladan:

(1) Mahkamah Tinggi terkhilaf kerana menerima pembelaan defendan kedua dan melepaskannya daripada liabiliti kerana kerugian yang dialami oleh plaintif. Keterangan tersedia tidak dapat mengekalkan apa-apa penemuan berdasarkan kedudukan undang-undang semasa pada setiap masa matan (lihat perenggan 55).

(2) Defendan kedua mempunyai kewajipan fidusiari kepada syarikat itu sebagai pengarah dan kewajipan kesetiaan sebagai pekerja. Dia bukan sahaja menyedari urusan tidak wajar yang mengelilingi persediaan dokumen-dokumen yang perlu untuk membuat bayaran kepada pihak ketiga yang tidak dibenarkan, dia telah, sememangnya, secara peribadi terlibat dengan pembuatan pelbagai dokumen rekaan. Apabila wang itu dipulangkan kepada defendan pertama selepas pihak ketiga yang tidak dibenarkan menolak 4% daripada daripada jumlah yang dibayar kepada mereka, defendan kedua telah menutup mata dan tidak memberitahu plaintif tentang fakta itu. Mahkamah sebulat suara berpendapat defendan kedua adalah bertanggungjawab kerana fraud, pelanggaran kewajipan fidusiari dan pelanggaran kewajipan kesetiaan (lihat perenggan 38 & 50–51).

(3) Defendan kedua telah melakukan tindakan yang membawa kepada plaintif mengalami kerugian besar. Dia tidak menafikan telah melakukan apa yang dilakukannya. Satu-satunya pembelaannya, bahawa dia telah bertindak di bawah arahan pegawai atasannya, iaitu defendan pertama, tidak boleh terpakai menyebelahinya kerana dia berada dalam kedudukan fidusiari dan kewajipan undang-undangnya adalah untuk melindungi kepentingan syarikat selagi dia masih kekal seorang pengarah. Wang yang didapati sampai ke tangan pihak ketiga yang tidak dibenarkan itu tidak mungkin tanpa pengetahuan dan perbuatan sengaja defendan kedua berdasarkan kedudukan kritikalnya dalam syarikat itu. Sebagai fidusiari dan juga pekerja, defendan kedua telah gagal melaksanakan kewajipan masing-masing yang diharapkan daripadanya (lihat perenggan 48–49).

(4) Walaupun kebiasaannya, menjadi orang bawahan bermakna defendan kedua perlu mematuhi arahan defendan pertama, undang-undang tidak

mengenakan kewajipan mutlak untuk mematuhi dalam semua situasi. Hanya perintah atau arahan yang sah dan munasabah perlu dipatuhi oleh orang bawahan. Pastinya arahan yang meragukan dan jelas menyalahi undang-undang tidak patut dipatuhi, jika apa pun. Untuk berbuat demikian sememangnya menjadikan orang bawahan itu seorang rakan sejenayah. Memandangkan kewajipan kesetiaannya untuk bertindak dalam cara yang demi kepentingan syarikat itu dan tidak untuk dirinya sendiri, kesetiaan membuta dan sikap tunduk kepada arahan yang lebih tinggi tidak boleh dibiarkan dan pembelaan seperti itu tidak dapat dikekalkan dalam hal keadaan kes itu (lihat peernggan 38 & 45).

(5) Keterangan terhadap defendan pertama amat banyak. Pembayaran kepada pihak ketiga tidak wajar langsung. Jumlah wang besar yang dipulangkan oleh pihak ketiga sebenarnya telah dibayar kepada defendan pertama dan selepas itu tiada siapa yang mengetahui apa yang berlaku kepada wang tersebut. Berdasarkan keterangan itu, khususnya daripada audit forensik KPMG, dari jumlah keseluruhan RM18,481,000 hanya RM3,110,000 telah diambil kira sebagai yang telah digunakan untuk membayar perbelanjaan sah plaintif. Baki RM15,371,000 masih tidak diambil kira. Berdasarkan keterangan, tiada sebab yang meyakinkan untuk mengganggu keputusan mahkamah perbicaraan terhadap defendan pertama (lihat perenggan 63 & 68).

(6) Defendan-defendan telah diperintahkan untuk bertanggungjawab secara bersesama dan berasingan untuk ganti rugi yang diperintahkan dalam penghakiman ini kerana terdapat keterangan tentang pakatan sulit antara mereka untuk menyebabkan kerugian kepada plaintif. Prinsip itu adalah bahawa ia tidak kira jika peranan oleh seorang pelaku tort adalah minima, kerana kewujudannya adalah mencukupi di sisi undang-undang untuk mendapati tanggungjawab bersama dan berasingan terhadap pelaku tort (lihat perenggan 69).]

Notes

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 226–246.

Cases referred to

Boustead Rimba Nilai Sdn Bhd v Mohed Suratman [2011] 1 LNS 1347, HC (refd)

Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor [2012] 5 MLJ 176; [2012] 1 LNS 258, CA (refd)

Digital Plus PTY Limited v Christopher Hamis & Ors [2002] NSWSC 33, SC (refd)

Land Credit Company of Ireland v Lord Fermoy [1869] LR Vol VIII, CA (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

Legislation referred to

Companies Act 1965 s 132

Appeal from: Civil Suit No S-22–577 of 2010 (High Court, Kuala Lumpur)

Nagarajah Muttiah (Adam Abdullah, Tanya Lopez and Jessica Lim Lee Wei with him) (Adam Abdullah & Mani) in Civil Appeal Nos W-02–320–02 of 2014 and W-02–550–03 of 2014 for the appellant.

Dhinesh Bhaskaran (Khor Meyven with him) (Shearn Delamore & Co) in Civil Appeal No W-02–336–02 of 2014 for the appellant.

Dhinesh Bhaskaran (Khor Meyven with him) (Shearn Delamore & Co) in Civil Appeal Nos W-02–320–02 of 2014 and W-02–550–03 of 2014 for the respondant.

David CY Lai (Alexia MW Lo with him) (David Lai & Tan) in Civil Appeal No W-02–336–02 of 2014 for the respondant.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Redmax Sdn Bhd ('the plaintiff') is a construction and engineering company with class A and a grade 7 certification from the Construction Industry Development Board and has undertaken a variety of building works for both the public and private sectors.

[2] Zaharen bin Hj Zakaria ('the first defendant') was a director of the plaintiff for the period from 1 June 1999 until 11 January 2010. He was also the managing director of the plaintiff at all material times until he was sacked by the plaintiff on 11 January 2010.

[3] Abdul Rahman bin Mohd Tahir ('the second defendant') was a director of the plaintiff from 6 August 2007 until 21 December 2009. He was also the finance director of the plaintiff at all material times until his resignation on 14 December 2009.

[4] One Dato' Mohamed bin Sulaiman ('Dato' Mohamed') had become acquainted with first defendant sometime in 1992. In 1996, Dato' Mohamed decided to acquire the plaintiff as a vehicle through which his children could gain experience in the business world. He asked the first defendant to mentor and to train his children. In return, the first defendant was given 40% of the plaintiff's shares without any monetary payment. Dato' Mohamed had appointed the first defendant as managing director of the plaintiff.

[5] The first defendant's role was to oversee the day-to-day operations and management of the plaintiff under Dato' Mohamed's supervision. The first defendant informed Dato' Mohamed that there was a requirement for a qualified and registered engineer to be appointed as a director and shareholder of the plaintiff. Eventually, based on the representation of the first defendant, one Mohd Radzman bin Ohman ('Radzman') was appointed to fulfill that purpose.

[6] It was agreed that Radzman's shareholding in the plaintiff would be derived from the first defendant's 40% shareholding in the plaintiff. However, it was later discovered that the transfer of shares to Radzman was instead, taken from the 60% shareholding owned by Dato' Mohamed's children, without the knowledge of Dato' Mohamed.

[7] After the acquisition of the plaintiff, Dato' Mohamed brought projects and finances into the plaintiff through his efforts, business contacts, and relationships, as at that time he had the requisite expertise, exposure, relationships, and contacts to bring in projects for the plaintiff.

[8] On 13 July 2002, Dato' Mohamed was appointed as a director to the plaintiff. Through Dato' Mohamed's and the first defendant's efforts, the plaintiff managed to secure various government projects including flood mitigation projects in Penang and Kedah.

[9] In December 2008, the plaintiff, through its wholly owned special purpose vehicle company, Makro Utama Sdn Bhd, was to apply for a bond issue of RM100m, whereby part of it was to repay the plaintiff's existing term loan which was incurred in relation to the expenses of one of the flood mitigation projects in Sungai Muda, Kedah awarded by Jabatan Pengairan dan Saliran ('JPS'). The bond was critical to the plaintiff's wellbeing because without the bond issue, the plaintiff would not have sufficient funds to proceed with the said project.

[10] The first defendant was responsible for the submission and approval of the bond as he was aware of the procedure involved in the bond issue. However Dato' Mohamed then realised that the plaintiff was short of about RM6m which was needed to pay the plaintiff's suppliers and subcontractors.

[11] After due enquiries, he discovered that the first defendant failed to ensure that the bond application was sent to the rightful party. The application was sent to the ministry of finance ('MOF') instead of to the correct party, the JPS. The first defendant failed to rectify the situation and left it to Dato' Mohamed to resolve the issue. This caused the unnecessary delay on the part of the plaintiff in paying its suppliers and subcontractors.

[12] Following that, Dato' Mohamed began to lose confidence in the first defendant. He issued a letter informing the plaintiff's staff, including the defendants, that he would be assuming total operational responsibilities and management as chairman of the plaintiff with immediate effect. All other directors would have to report directly to him. Subsequently, Feizal (one of Dato' Mohamed's children) and one Tan Sri Zainol bin Mahmood were appointed as directors of the plaintiff.

[13] A director's resolution dated 9 October 2009 was passed to appoint KPMG Corporate Services Sdn Bhd ('KPMG') to carry out a special review of the plaintiff's financial statements. KPMG's scope of duties later was expanded to conduct a full investigative audit of the plaintiff's financial statements based on a director's resolution dated 11 November 2009.

[14] A number of audits, including a full investigative audit, conducted by KPMG revealed that the defendants, either on their own or in concert with others, had caused the plaintiff to suffer substantial losses. There were irregularities in relation to payments made to third parties based on fictitious transactions and documents. The audit findings had shown that none of the third parties concerned were suppliers or subcontractors of the plaintiff, or had provided any services to the plaintiff. Yet substantial payments were made to them by the defendants.

[15] Subsequently, the first defendant was invited to attend a meeting with KPMG in order to assist the latter in its investigative audit. The first defendant attended the first meeting with his legal counsel. The meeting was rescheduled and the first defendant was told to come without his legal counsel. The first defendant failed to attend the subsequent meeting but instead recorded his protest to the meeting.

[16] The plaintiff addressed a letter to the first defendant reminding him of his fiduciary duties to the plaintiff. A show cause letter was subsequently issued to the first defendant wherein the first defendant was required to answer six allegations of misconduct against him. The first defendant replied expressing surprise at the allegations as all payments were allegedly made with the knowledge and concurrence of Dato' Mohamed.

[17] By a letter dated 11 January 2010, the first defendant was dismissed from his post as managing director of the plaintiff, and by way of an extraordinary general meeting ('EGM'), a resolution was passed to remove the first defendant as a director of the plaintiff.

[18] In respect of the second defendant, after being interviewed, he tendered his resignation by way of a letter dated 14 December 2009 and he finally exited the plaintiff on 6 January 2010.

[19] The plaintiff, had since instituted its claims against the defendants in respect of the defendants' conduct in unlawfully paying out monies from the plaintiff to third parties based on fictitious transactions and documents and had therefore committed fraud and breached their fiduciary duties towards the plaintiff. The plaintiff claimed that, by reason of the defendants' actions, the plaintiff had suffered loss and damage.

[20] The plaintiff, therefore claimed as follows:

(a) all due accounts and inquires in relation to any consideration and/or benefit, whether in monetary form or otherwise, received by the defendants pursuant to, refereable to, or otherwise relating directly or indirectly to the transactions entered into by the defendants on behalf of the plaintiff pursuant to the fraud and/or conspiracy;

(b) payment to the plaintiff of such sums as may be found due by the defendants to the plaintiff in consequence of prayer (a) above;

(c) an order that the plaintiff be allowed to trace all such sums into the hands of the defendants or elsewhere as they may be found;

(d) a declaration as to what sums in the hands of the defendants are assets of the plaintiff or the traceable proceeds thereof;

(e) an order for the immediate delivery up to the plaintiff of all documents, material and/or articles belonging to the plaintiff, including but not limited to books, accounting records, bank statements, payment advice, payment vouchers, purchase orders, invoices, correspondences and all other relevant documents belonging to the plaintiff, which are in the possession, custody and/or control of the defendants;

(f) general and exemplary damages; and

(g) interest and costs.

THE FIRST DEFENDANT'S CASE

[21] The first defendant pleaded that the plaintiff was in reality a partnership between the first defendant and Dato' Mohamed with separate responsibilities.

[22] Various projects awarded to the plaintiff were due solely to the first defendant's efforts and the first defendant did not act under the supervision and direction of Dato' Mohamed.

[23] The said bond issuance was an idea mooted by first defendant which required an assignment by the plaintiff of all proceeds to be received by the plaintiff from one of the projects to be held in trust. In order to give effect to the assignment, consent was needed from JPS and the Government of Malaysia. The bond was sent to JPS as required but JPS sought the approval of MOF. The delay was occasioned by MOF and not by the first defendant.

[24] The first defendant denied neglecting his duties as managing director as he had delegated his duties to Radzman.

[25] The first defendant also contended that he was duly authorised by the plaintiff and Dato Mohamed to make payments to the third parties.

[26] The first defendant also pleaded that the plaintiff had no cause of action against him.

THE SECOND DEFENDANT'S CASE

[27] The second defendant contended that the evidence given had clearly shown that he did not use or receive any part of the sums as alleged. He was merely an employee of the plaintiff and that he did not approve all of the payment vouchers in respect of the payments made towards some of the projects. Any payment approved by him was done on the first defendant's instructions.

[28] The second defendant denied breaching any fiduciary duties as he did not have any interest in the plaintiff.

FINDINGS OF THE LEARNED HIGH COURT JUDGE

[29] The learned High Court judge ('the HCJ') had on 16 January 2014 allowed the plaintiff's claim against the first defendant for fraud, breach of fiduciary duties and breach of fidelity. In short, he granted the prayers enumerated in the plaintiff's statement of claim. However, the learned HCJ had dismissed the plaintiff's action against the second defendant. This can be seen from the first decision of the learned HCJ that was concerned with the issue of liability.

[30] On 27 February 2014, the learned HCJ then delivered his decision on quantum of damages ('the second decision') where the learned HCJ ordered the first defendant to pay to the plaintiff the following:

(a) general damages in the sum of RM15,371,000;

(b) exemplary damages in the sum of RM500,000; and

(c) costs in the sum of RM100,000.

As the second defendant was completely exonerated from any liability by the learned HCJ, no order on damages was ordered against him.

THE APPEALS

[31] Dissatisfied with the decisions, the first defendant had then proceeded to file two notices of appeals to the Court of Appeal namely, vide Appeal No W-02–320–02 of 2014 ('Appeal 320') in respect of the first decision, and Appeal No W-02–550–03 of 2014 ('Appeal 550') in respect of the second decision. The plaintiff on the other hand, had filed an appeal against the learned HCJ's decision in dismissing its claim against the second defendant vide Appeal No W-02–336–02 of 2014 ('Appeal 336').

[32] On 10 of April 2014, this court had directed that the three appeals to be joined and heard together. We had then proceeded to hear these three appeals and at the end of submissions by all learned counsel, we had decided as follows:

(a) for Appeal 320 and Appeal 550, both appeals by the first defendant were dismissed with global costs of RM50,000 to be paid by the first defendant to the respondent/plaintiff. We had also affirmed the decision of the learned HCJ; and

(b) for Appeal 336, the appeal was allowed with costs of RM65,000 here and below to be paid by the second defendant to the appellant/plaintiff. The relevant HCJ's judgment was set aside, and we had also ordered the second defendant to pay exemplary damages in the sum of RM200,000 to the plaintiff.

[33] We now proffer our reasons for having so decided in respect of the three appeals.

OUR FINDINGS

[34] For Appeal Nos 320 and 550, the first defendant raised 35 grounds of appeal in his memorandum of appeal. However, these grounds essentially focused on the following core issues:

(a) whether the plaintiff, through PW1 who is allegedly the directing mind and will of the plaintiff, had the requisite knowledge of and consented to the payments to third parties; and

(b) whether the plaintiff has suffered loss.

[35] For Appeal 336, the issues raised by the plaintiff had been that the second defendant was liable for fraud, breach of fiduciary duties and breach of fidelity, on two main reasons, namely:

(a) the second defendant had followed the first defendant's instructions blindly; and

(b) the second defendant had approved the payment vouchers without verifying the payment to the third parties

[36] The defence of the second defendant was that he had followed the instructions to make the numerous payments to third parties from the first defendant who was then the managing director of the plaintiff. The second defendant was then the finance director, an employee of the plaintiff, although he was later made a director on the board of directors of the plaintiff. It was submitted by learned counsel for the second defendant that his client would be guilty of insubordination if he did not obey the instructions given by the first defendant to him to facilitate the numerous payments to the various third parties. It was also submitted before us that the second defendant did not benefit nor profit from these dubious transactions.

[37] This, to our mind, brought into sharp focus, the role of a director and that of an employee, in a company. In the factual matrix of this appeal before us, it was beyond dispute that the second defendant was both a director on the board of directors of the plaintiff, as well as an employee of the plaintiff, being its director of finance.

[38] At the outset, it must be made clear that as a director of the plaintiff, the second defendant owed a fiduciary duty to the company and the shareholders. Decided cases abound had made the relationship between a director and his company as being trite. As an employee of the plaintiff, the second defendant also had the duty of fidelity towards the company. Basically, that would mean a duty to be loyal to the interest of the company and its shareholders. Both duties presuppose the need to ensure that a director and an employee must act and discharge their responsibilities in a manner that is in the best interest of the company and not act in a manner that may be detrimental to the interest of the company.

[39] At this juncture, it must be recalled that the action by the plaintiff against the second defendant was based on fraud, breach of fiduciary duty and breach of fidelity duty where it was alleged that the plaintiff had suffered losses as a result of such misconduct on the part of the second defendant.

[40] From the appraisal of the evidence led before the learned HCJ, it was clear that the second defendant did not deny that he had done what needed to

be done in order to make the payments to the third parties, but that he had so acted on the instructions of the first defendant. That was basically his main defence to the claims that were mounted against him by the plaintiff.

[41] The pertinent question raised in the circumstances was, whether such a defence was sustainable in law, so as to extricate him from liability for the losses that were incurred by the plaintiff. In that regard, the learned HCJ had answered in the affirmative. We would now reproduce the relevant excerpt from the judgment of the learned HCJ as follows:

> ... any payments approved by him in respect of the SP2 and SM2 Project were done so on the instructions of the first defendant who confirmed that he instructed the second defendant which companies to pay to, by giving him the names of those companies. The first defendant also said that the preparation of payment advices and supporting documents was on his instructions.
>
> This court accepts the second defendant's contention that if there is any overstatement of the work in progress for the SM2 Project in the plaintiff's said 2008 annual accounts by including works from the SP2 Project, it was done on the instructions of the first defendant, who was the second defendant's immediate boss. The second defendant was merely following instructions given to him by his superior, the first defendant which were expected to be followed and if not so followed, would result in serious consequences and be viewed as an act of subordination on the part of the second defendant.

[42] It was submitted before us by learned counsel for the plaintiff that the approach taken by the learned HCJ in coming to such a finding in favour of the second defendant was too simplistic, in as much as it was erroneous. Essentially, the trial court had accepted the second defendant's line of defence that as the second defendant was a mere employee of the plaintiff and that as he was subordinate in rank to the first defendant, it was justified for him to do acts, which may be wrongful against the interest of the company as long as he had done so pursuant to the instructions of the first defendant. A failure on his part to obey the instructions given by the first defendant would tantamount to a dereliction of duty on his part, which would result in serious consequences. It could be viewed as an act of in subordination on the part of the second defendant.

[43] In our view, the court had to look at the whole circumstances of the case for a proper context to be obtained. We noted that the second defendant was indeed an employee of the plaintiff. But it did not end there. He was not just a mere employee as such. The second defendant was the finance director of the plaintiff and in that capacity, he was seized of considerable power over the financial matters of the plaintiff. In that position, any movement of substantial amount of money from the plaintiff must have his prior approval. He was even involved in the creation of invoices that would be a precursor prior to any

outward flow of money from the plaintiff to outside suppliers. An employee he may have been, suffice for us to say that he was no means a mere simpleton. On the contrary, the second defendant was the money man of the plaintiff in whom the plaintiff had entrusted the proper management of its proverbial lifeline, namely, its financial resources.

[44] Under the law, an employee of a company has a duty of fidelity to be observed at all times during his employment with the company. What is this duty of fidelity? Every employment contract contains an implied term that an employee will serve his employer with good faith and fidelity (the duty of fidelity). The duty of fidelity is owed by all employees and is to be distinguished from a fiduciary duty. A fiduciary duty requires an employee to act in the interests of his employer, whereas the duty of fidelity requires an employee to have regard to his employer's interests. Inherent in that duty to have regard to his employer's interests must be a duty not to act in a manner which would be to disregard his employer's interests. Such acts must include acts that are inherently detrimental to his company's interests.

[45] In the context of this case, of course, ordinarily being a subordinate must necessarily mean that the second defendant would have to obey instructions emanating from the first defendant. But the law does not impose absolute duty to obey in all situations. Only lawful and reasonable directives or instuctions must be obeyed by the subordinate. Definitely instructions given which are dubious and plainly unlawful, ought not to be obeyed to the tee, if at all. To do so would in fact make a subordinate an accomplice. The law does not impose such an onerous duty on an employee in the discharge of his obligations to his employer. As such, with such a duty of fidelity, blind loyalty and subservience to a superior's instructions cannot be condoned. Such a defence could not hold water, much less be sustained, definitely not in the circumstances obtaining in this appeal before us.

[46] But, there was another factor which, to our mind, must weigh heavily against the second defendant. From the undisputed evidence led before the learned HCJ, as was alluded to earlier, the second defendant was also appointed as a director on the plaintiff's board of directors. With that appointment, he had assumed another duty qua the company. That duty is the fiduciary duty owed by all directors to their company. As alluded to earlier in our judgment, that duty obligates a director of a company to act in the best interest of the company. We do not believe that there should be a limited scope to be given to what would constitute a fiduciary duty. Suffice to state here that the baseline threshold must be to see whether the director's impugned conduct has the effect of bringing about adverse and detrimental effects against the interests and well-being of the company. It is akin to a duty thrust upon a trustee.

[47] In *Land Credit Company of Ireland v Lord Fermoy* [1869] LR Vol VIII at p 13, the English Court of Appeal held that a director 'was bound to inquire and ascertain for what purpose the cheques were required, and, having ascertained, he was bound not to sign them'.

[48] The evidence led by the plaintiff in this case has, to our mind exhibited numerous instances where the second defendant had failed to observe his fiduciary duty to the plaintiff. To the contrary, he had done acts which had led to the plaintiff suffering huge losses. In fact, the second defendant did not deny having done what he did with regard to the preparation of the vouchers leading to the said losses having been incurred by the company. His defence and only defence had been that he was acting under instructions from his immediate superior, namely the first defendant. His stance had found favour with the learned HCJ and he was completely exonerated from any liability in this scam.

[49] With respect, such a defence ought not to apply, in the circumstances of this case, in favour of the second defendant. In fact, it flew across the face of a fiduciary, of which the second defendant was one at the material time, whose legal duty it was to protect the interests of the company and that duty continued for as long as he remained a director of the company. We would agree with the submission of learned counsel for the plaintiff that the monies that had found their way to the unauthorised third parties, would not have been possible without the knowing and deliberate facilitation of the second defendant in view of his critical position in the plaintiff's company at the material times. As a fiduciary as well as an employee, the second defendant had failed to discharge his respective duty, as was expected of him. Even basing on the factual findings made by the learned HCJ, it is clear to our mind that the second defendant was content to follow the first defendant's instructions and was crucial in implementing the creation of fictitious documents and transactions to justify the payments to the third parties, therefore resulting in the plaintiff's funds being grossly misused and misapplied.

[50] As such, we were unanimous in our view that the second defendant was liable for fraud, breach of fiduciary duties and breach of duty of fidelity. We find no error having been committed by the learned HCJ on the salient and material facts as regards the role and actions and omissions committed by the second defendant, but with respect, we could not agree with his ultimate finding that the second defendant was legally justified in doing what he did on the stated defence that he was merely carrying out or implementing the instructions given to him by the first defendant, who was then the managing director of the plaintiff's company. To our mind, the law applicable in this instance, as between a fiduciary and his principal is clear, in that the former must act, always in interest of the latter. The second defendant had failed in that regard. It was our finding that the factual scenario that had obtained in the

Land Credit Company of Ireland v Lord Fermoy would pale if compared to what the second defendant had done in this case.

[51] In this case before us, the second defendant had not only been aware of the improper dealings that had surounded the preparation of the necessary documents needed to make payments to the unauthorised third parties, in fact he was personally involved in the creation of the numerous fictitious documents. When the monies were returned to the first defendant after the unauthorised third parties had deducted the 4% from the sum paid to them, he had turned a blind eye and had not informed the plaintiff of that fact.

[52] As an employee, he had shown that he was not fidel qua the plaintiff. His actions and omissions pertaining to payments made to unauthorised third parties had exhibited a series of conduct which had militated against a duty of fidelity not to act for the benefit of any third party, to the detriment of the plaintiff. Learned counsel for the plaintiff had cited before us the case of *Boustead Rimba Nilai Sdn Bhd v Mohed Suratman* [2011] 1 LNS 1347. Having had the benefit of referring to the decision in that case, we found no reason to disagree with what was said therein on the duty of fidelity and what it would entail therefrom. In that case, the court there had referred to the case of *Digital Plus PTY Limited v Christopher Hamis & Ors* [2002] NSWSC 33 where the Supreme Court of New South Wales had occasion to state the following:

> There is more than one category of fudiciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of anoher. The relationship between employer and employee is of this character. The core obligation of a fiduciary of this kind is the obligation of loyalty. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer.

[53] As such, we found that learned counsel for the plaintiff was justified when he submitted before us 'that the second defendant had not acted loyally, honestly, with reasonable diligence, in good faith or in the best interest of the plaintiff, but instead acted in a manner that materially and detrimentally affected the plaintiff's business interests. Further, the second defendant obviosly placed himself in a position of conflict, resulting in the first defendant and the third parties benefit to the plaintiff's detriment'.

[54] Again therefore, we had found that the second defendant did not live up to that expectation which was legally imposed on him, either.

[55] Therefore it was clear to our mind that the learned HCJ was in error when he accepted the defence of the second defendant thereby exonerating him from any liability for the losses suffered by the plaintiff. The available evidence as led before him could not sustain such a finding by the learned HCJ in light of the prevailing legal position at all material times. Our appellate intervention had therefore become necessary in order to right what clearly had been a wrong done unto the plaintiff as a result of the said decision of the learned HCJ with regard to the plaintiff's claim against the second defendant. The plaintiff's appeal against the said decision of the learned HCJ pertaining to the second defendant was therefore allowed an judgment was entered in favour of the plaintiff, in terms of prayers 1–5. As regards general damages and exemplary damages, we order the second defendant to pay the sum RM200,000 to the plaintiff.

[56] We now turn to the appeals by the first defendant against the findings of liability and the order on quantum which the learned HCJ had ordered against him. His appeals before us had been Appeal Nos 320 and 550 on liability and quantum respectively.

[57] As a quick recap, the plaintiff's essential case against the first defendant had been centred on the allegation that the first defendant had caused the losses to the plaintiff by siphoning off the plaintiff's monies by way of making unauthorised payments to third party companies whom he knew were not suppliers of goods to the plaintiff and were therefore not entitled to be paid at all. Such payments were made premised upon fictitious transactions and the creation of false documents in order that such payments could be facilitated. Payments were made by the plaintiff on account of the dubious approvals given by the second defendant in his capacity as the finance director of the plaintiff. We had seen how the second defendant had been let off because the learned HCJ had agreed with his stated defence that he was merely following the instructions given to him by the first defendant, who was then his superior in the company, being the managing director at the material times. The paying out of the monies illegally was only part of the scam. The other part of the scam had seen the return of the said monies back by the unauthorised third party companies to the first defendant after the former had retained 4% of the sum paid to them. It was in evidence that until today, those returned monies had not been accounted for. Those returned monies were returned to the first defendant, either into his bank account or in cash. The second defendant knew of this, but had chosen not to report the fact to the plaintiff. We had expressed our view on this when we allowed the plaintiff's appeal against the order of the learned HCJ which had completely exonerated the second defendant from any liability. To our mind, the second defendant had failed to discharge his duties owed by him to the plaintiff in the manner he had conducted himself in the whole unsavoury episode.

[58] After considering the submissions by both counsel, we dismissed both the appeals by the first defendant. We had read the grounds of judgment of the learned HCJ pertaining to his findings in respect of the plaintiff's case against the first defendant. His findings of facts had been supported by the evidence, both oral and documentary. With respect, we had no cogent reason whatsoever to disturb his decision against the first defendant, in light of the evidence that was led before him. We noted too that the learned HCJ had made specific reference in his grounds of judgment that had pertained to his observation of the credibility of the first defendant. It must be said that his assessment and appreciation of the first defendant's credibility had not been complimentary to say the least. The issue of credibility of witnesses had come into sharp focus in this case, especially when it revolved on the issue of whether the PW1 was aware of the first defendant's wrongdoings, even to the extent that PW1 was alleged to have consented to the said wrongdoings. Having weighed the demeanour of the witnesses, it was the finding of the learned HCJ that he had decided to treat the first defendant's character and testimony with great care and caution. It must be reiterated here that the learned HCJ did not completely ignore the evidence of the first defendant, just that he had to be more careful in his treatment and appreciation of his evidence when he had to compare it with the evidence of PW1, whom the learned HCJ had accepted as an honest and upright witness. Of particular significance has been the finding made by the learned HCJ that the first defendant had proven himself to be selective in his memory when cross-examined by the adverse counsel. The instances of the first defendant being caught either lying or contradicting himself had been numerous. To cite as illustrations of those instances, we would advert to his answers pertaining to the illegal payments he had instructed to be paid the unauthorised third party companies, as follows.

Appendix B: Credibility of the first defendant

The illegal payments:

(a) the most glaring example of the falsities expounded by the first defendant relates to the illegal payments made to the third parties;

(b) when cross-examined, the first defendant instead insisted that all the payments, and his conduct, were not illegal in any way;

(c) the first defendant was then cross-examined as to why, if this were so, the plaintiff did not simply pay the monies out directly to the intended recipients, rather than going through the convoluted and unnecessary process of creating fictitious documents and transactions, paying the monies to the third parties, allowing them to retain 4%, and then the first defendant receiving the balance monies personally predominantly in cash with no records of any payments after that;

(d) when faced with this eminently logical question, the first defendant was simply unable to answer. The first defendant's inability to provide this

simple explanation speaks volumes as to the illegality of the payments, the misuse by him of the plaintiff's funds, and the lies furnished by him during his testimony; and

(e) further, the first defendant claimed that the 4% (totalling RM739,420) was retained by the third parties from their 'services'. However, when presssed, he was unable to explain what these services were, and how and why such a large payment was justifiable or necessary.

[59] Based on his assessment of the first defendant's credibility as a witness before him, the learned HCJ had come to the following conclusion:

> [ii] Having assessed the first defendant's credibility and in the light of aforesaid findings, this court finds that the first defendant is the type of person who will not hesitate to create fictitious documents and transactions, and mislead the plaintiff, to achieve his own purposes as shown by the fabrication of documents and transactions to make wrongful payments to the third parties and the wrongful manipulation of the plaintiff's said 2008 accounts, which stated an artificial and false profit of RM11,991,892 being stated in the accounts instead of a massive loss of RM55,889,650.

[60] This case against the first defendant had illustrated in no small measure, the duty of a director to his company, being his principal. He was a fiduciary and as one, he owed a duty to protect the interests of his principal. In short, he must never act in any manner that would put his company in harm's way. He must not act in any manner that would be detrimental to the company's interests. We had occasion to advert to this duty of a director when we were dealing with the appeal pertaining to the second defendant. Nevertheless, we felt rather compelled here to emphasise the duty cast upon a director by adverting to a decision of this court in the case of *Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176; [2012] 1 LNS 258, where it was held, among others, as follows:

(a) the directors must act bona fide in the interests of the company and must not exercise their powers for any collateral purpose;

(b) a director who, by using his position, makes a profit is liable to account for that profit; and

(c) where a director finds himself in a position where his duty to the company and his personal interests conflict, any contract entered is voidable at the instance of the company.

[61] Further, there is that statutory provision as contained in the Companies Act 1965 as encapsulated under s 132 therein. For impact, we now reproduce s 132 of the Companies Act 1965 which reads as follows:

(1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.

(1A) A director of a company shall exercise reasonable care, skill and diligence with—

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) any additional knowledge, skill and experience which the director in fact has.

[62] In other words, a director of a company has to give his all to serve in the best interest of the company of which he is a director. As a fiduciary, the company is backed up by the statutory provision to expect nothing less from its directors. Gone are the days when a company director can be heard to say that he was a sleeping director and expect to escape liability. His duty may appear onerous but that is to be expected as he is part of the alter ego of the company. He is a fiduciary, a trustee. It is not his business to act like a rogue, much less to act to the detriment of the company.

[63] Having perused through the evidence and the record of appeal, we were of the considered view that the case against the first defendant had been overwhelming, to say the least. The payments made to the third party companies were not justified at all. Substantial sums of monies that were returned by the said third party companies were in fact paid to him and from thereon, nobody, except perhaps himself, knew what had happened to those monies. From the evidence adduced, in particular from the KPMG forensic audit, of a total sum of RM18,481,000, only RM3,110,000 has been accounted for as having been used to pay the plaintiff's legitimate expenses. The balance of RM15,371,000 remains unaccounted for.

[64] The first defendant was not able to explain why such payments had taken a journey which was so convoluted, if indeed they were legitimate at all to begin with. It was so clear to us that the plaintiff's case against the first defendant had been made out more than sufficiently so as to entitle the learned HCJ to enter judgment in its favour as prayed for.

[65] In fact, the first defendant had admitted to his involvement in this dastardly scam that was perpetrated against his own principal company as could be seen from the series of his answers during his cross-examination by learned counsel, Mr Dhinesh Bhaskaran for the plaintiff at trial. Indeed, this had not escaped the learned HCJ's keen observation and he had reproduced this verbatim in his ground of judgment, which we now reproduce:

Dhinesh Bhaskaran:

... Now, according to you Dato' Seri when he signed your letter of appointment as Managing Director, he wrote the words 'you may use this letter as authority to pay'.

Encik Zaharen, did he write the words 'you may use this letter as authority to pay money out of the company and use it any way you want?' Did he use any such words?

DW1, Zaharen bin Zakaria:

No.

Dhinesh Bhaskaran:

The words 'you may use this letter as authority to pay' do not signify that you are given the freedom to take money out and create fictitious transactions as and when you see fit. Is that right Encik Zaharen?

DW1, Zaharen bin Zakaria:

Yes.

(Emphasis added.)

Dhinesh Bhaskaran:

... In other word, Encik Zaharen, you took responsibility for these accounts. Didn't you?

DW1, Zaharen bin Zakaria:

Yes.

Dhinesh Bhaskaran:

... Now, Encik Zaharen, based on Encik Rahman's answers given to KPMG, he is basically saying that whatever adjustments or management, what he calls management of the accounts was done after discussions with you. So you were aware of all this management or adjustments to the accounts, weren't you?

DW1, Zaharen bin Zakaria:

Yes.

Dhinesh Bhaskaran:

My question is very specific Encik Zaharen. Whatever Encik Rahman did, he did on his own. Is that your evidence?

DW1, Zaharen bin Zakaria:

Of course with discussion.

Dhinesh Bhaskaran:

With whom? With yourself, right?

DW1, Zaharen bin Zakaria:

Yes.

[66] In the circumstances of this case, the evidence had clearly shown the blatant breach of the duty that was owed by both the defendants to their employer company. This case involving both the defendants has been a civil case, the applicable standard of proof must necessarily be the standard of on the balance of probabilities. In the case of *Miller v Minister of Pensions* [1947] 2 All

ER 372 ('*Miller* case') Denning J (as he then was) had described when a plaintiff can be said to have discharged that standard. And it is this, where the most learned justice had said:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

[67] In any event, in light of the evidence that were led before the court, the plaintiff had discharged and surpassed the required standard in establishing its cases against the respective defendants.

[68] As such, we saw no valid and cogent reason to interfere in any way with the learned HCJ's decision in that regard as pertaining to the first defendant. We had therefore dismissed his appeals against findings on liability and quantum of damages as so entered against him by the learned trial judge.

[69] For the avoidance of any doubt, both the first and second defendants were ordered to be jointly and severally liable for the damages that we had ordered in this judgment, as was prayed for by the plaintiff, as there existed evidence of collusion between the first and second defendants to cause and bring about the losses to the plaintiff. The principle is that it does not matter if the role by one of the tortfeasors is minima, as its existence would be sufficient in law to found a joint and several liability against the tortfeasors.

[70] As regards costs, we had awarded costs in favour of the plaintiff in the following sums. The second defendant was ordered to pay costs of RM65,000 here and below, while the first defendant was ordered to pay global costs of RM50,000 to the plaintiff, for both his appeals. We had so ordered accordingly.

First defendant's appeals dismissed and decision of the High Court in that respect affirmed; plaintiff's appeal allowed, the High Court's judgment vis-a-vis the second defendant set aside, judgment entered against him and ordered to pay plaintiff RM200,000 in exemplary damages.

Reported by Ashok Kumar